

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON
 PORTLAND DIVISION

STATE FARM FIRE AND CASUALTY)
 COMPANY,)

Plaintiff,)

v.)

ARBOR VINEYARDS HOMEOWNERS)
 ASSOCIATION, an Oregon)
 corporation; ARBOR VINEYARDS,)
 LLC, an Oregon limited liabil-)
 ity company, formerly known as)
 ARBOR OAKS, LLC; WEST HILLS)
 DEVELOPMENT COMPANY, INC., an)
 Oregon corporation; WALTER E.)
 REMMERS, an individual; and)
 DENNIS E. SACKOFF, an)
 individual,)

Defendants.)

No. CV-10-504-HU

OPINION & ORDER

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/ / /

1 - OPINION & ORDER

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 9 Development Company, Remmers, and Sackoff

10 HUBEL, Magistrate Judge:

11 Plaintiff State Farm Fire and Casualty Company brings this
 12 declaratory judgment action against defendants Arbor Vineyards
 13 Homeowners Association (HOA), Arbor Vineyards, LLC, West Hills
 14 Development Company, Inc., Walter Remmers, and Dennis Sackoff (the
 15 Arbor LLC defendants). The action concerns plaintiff's duty to
 16 indemnify defendants pursuant to an insurance policy, in a pending
 17 state court case.

18 All defendants move to abate the action.¹ Plaintiff also
 19 moves to dismiss two counterclaims brought against it by the Arbor
 20 LLC defendants. All parties have consented to entry of final
 21 judgment by a Magistrate Judge in accordance with Federal Rule of
 22 Civil Procedure 73 and 28 U.S.C. § 636(c). I grant the motion to
 23 abate and the motion to dismiss.

24 BACKGROUND

25 The HOA and the Arbor LLC defendants are litigants in a

26
 27 ¹ The motion was filed by the Arbor LLC defendants. In a
 28 separate September 24, 2010 filing, the HOA joined the motion to
 abate (docket #31).

1 pending lawsuit in Washington County. The HOA filed an Amended
2 Complaint in that action on January 19, 2010. In the instant case,
3 plaintiff alleges that the underlying lawsuit involves claims by
4 the HOA for alleged misconduct in the building, selling, and
5 managing, prior to turnover, of 101 common wall residential units
6 ("the Townhouses"), located in the Arbor Vineyards Planned Unit
7 Development.²

8 In the Complaint in this case, plaintiff states that it has
9 accepted the tender of defense of the underlying action from the
10 Arbor LLC defendants and is currently participating in the defense
11 subject to a reservation of rights.³ But, plaintiff alleges, a
12 dispute exists between plaintiff and the Arbor LLC defendants
13 concerning the scope and extent of plaintiff's duty to indemnify
14 the potential insureds under the policy plaintiff issued to the HOA
15 for the period July 23, 2003, through July 23, 2010.

16 Plaintiff alleges that subject to its reservation of the right
17 to assert additional coverage defenses following resolution of the
18 underlying lawsuit, it "limits its request for declaratory relief
19 to issues that can be decided as a matter of law by reference only
20 to the Policy, the Underlying Complaint and undisputed facts."
21 Compl. at ¶ 18. Plaintiff seeks six "legal declarations regarding
22 its potential indemnity obligations to the potential insureds."
23 Id. at ¶ 19.

24 / / /

25
26 ² A copy of the underlying complaint is attached as Exhibit
27 2 to the Complaint in this case.

28 ³ A copy of the insurance policy is attached as Exhibit 1
to the Complaint.

STANDARDS

I. Declaratory Judgment Act

The Declaratory Judgment Act permits a federal court to declare the rights of parties "to a case of actual controversy within its jurisdiction." 28 U.S.C. § 2201(a). A complaint seeking federal declaratory relief must first present an actual controversy within the meaning of Article III of the United States Constitution. Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1222 (9th Cir 1998). The Complaint must also fulfill statutory jurisdictional prerequisites. Id. Finally,

[i]f the suit passes constitutional and statutory muster, the district court must also be satisfied that entertaining the action is appropriate. This determination is discretionary, for the Declaratory Judgment Act is deliberately cast in terms of permissive, rather than mandatory, authority.

Id. at 1222-23.

In determining whether entertaining the action is appropriate, the factors from Brillhart v. Excess Insurance Company of America, 316 U.S. 491 (1942), "remain the philosophic touchstone for the district court." Dizol, 133 F.3d at 1225. They are: (1) avoiding needless determinations of state law issues; (2) discouraging litigants from filing declaratory actions as a means of forum shopping; and (3) avoiding duplicative litigation. Id. In addition, other considerations may be relevant: (1) whether the declaratory action will settle all aspects of the controversy; (2) whether the declaratory action will serve a useful purpose in clarifying the legal relations at issue; (3) whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a res judicata advantage; (4)

1 whether the use of a declaratory action will result in entanglement
2 between the federal and state court systems; (5) the convenience of
3 the parties; and (6) the availability and relative convenience of
4 other remedies. Id. at 1225 n.5.

5 While the presence of "parallel state proceedings involving
6 the same issues and parties pending at the time the federal
7 declaratory action is filed" results in a "presumption that the
8 entire suit should be heard in state court[,] "there is no
9 presumption in favor of abstention in declaratory actions
10 generally, nor in insurance coverage cases specifically." Id. at
11 1225. "The pendency of a state court action does not, of itself,
12 require a district court to refuse federal declaratory relief."
13 Id. Accordingly, nothing prevents an insurer "from invoking
14 diversity jurisdiction to bring a declaratory judgment action
15 against an insured on an issue of coverage." Id.

16 II. Motion to Dismiss

17 On a motion to dismiss, the court must review the sufficiency
18 of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).
19 All allegations of material fact are taken as true and construed in
20 the light most favorable to the nonmoving party. American Family
21 Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120
22 (9th Cir. 2002). However, the court need not accept conclusory
23 allegations as truthful. Holden v Hagopian, 978 F.2d 1115, 1121
24 (9th Cir. 1992).

25 A motion to dismiss under Rule 12(b)(6) will be granted if
26 plaintiff alleges the "grounds" of his "entitlement to relief" with
27 nothing "more than labels and conclusions, and a formulaic
28 recitation of the elements of a cause of action[.]" Bell Atlantic

1 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotation
2 omitted). "Factual allegations must be enough to raise a right to
3 relief above the speculative level, . . . on the assumption that
4 all the allegations in the complaint are true (even if doubtful in
5 fact)[.]" Id. (citations and footnote omitted).

6 To survive a motion to dismiss, the complaint "must contain
7 sufficient factual matter, accepted as true, to state a claim to
8 relief that is plausible on its face[.]" meaning "when the
9 plaintiff pleads factual content that allows the court to draw the
10 reasonable inference that the defendant is liable for the
11 misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949
12 (2009) (internal quotation omitted). Additionally, "only a
13 complaint that states a plausible claim for relief survives a
14 motion to dismiss." Id. at 1950. The complaint must contain
15 "well-pleaded facts" which "permit the court to infer more than the
16 mere possibility of misconduct." Id.

17 DISCUSSION

18 I. Declaratory Judgment Act

19 The Ninth Circuit has "consistently held that a dispute
20 between an insurer and its insureds over the duties imposed by an
21 insurance contract satisfies Article III's case and controversy
22 requirement." Dizol, 133 F.3d at 1222 n.2. A case or controversy
23 is found when an insurer brings a declaratory judgment action
24 regarding its duty to defend and indemnify. See, e.g., American
25 States Ins. Co. v. Kearns, 15 F.3d 142, 144 (9th Cir. 1994). Such
26 is the case here.

27 Statutory jurisdictional requirements are also met because
28 there is complete diversity between the parties and the amount in

1 controversy is more than \$75,000. Thus, statutory jurisdiction is
2 proper under 28 U.S.C. § 1332(a). As to the Brillhart factors, on
3 balance, I find that entertaining the action is appropriate.

4 II. Motion to Abate

5 In a 2001 Findings & Recommendation, subsequently adopted by
6 Judge Haggerty, I discussed at some length the relevant analysis
7 under Oregon law for resolving motions to stay an action by an
8 insurer seeking declarations about its duty to defend and/or
9 indemnify a potential insured in an underlying action. The Home
10 Indemnity Co. v. Stimson Lumber Co., 229 F. Supp. 2d 1075, 1087-88
11 (D. Or. 2001). I concluded that a fair reading of North Pacific
12 Insurance Co. v. Wilson's Distributing Service, Inc., 138 Or. App.
13 166, 908 P.2d 827 (1995), the relevant Oregon case on the issue,
14 indicated that there were two required questions in the stay
15 analysis:

16 (1) whether the insurer could develop facts in a
17 declaratory judgment action, commenced before the
18 underlying tort action is concluded, that would negate
19 the insurer's duty to defend; and (2) does the
20 declaratory judgment action force an insured to
prematurely litigate the insured's potential liability in
underlying tort claims and require the insured to take
inconsistent positions?

21 The Home, 229 F. Supp. 2d at 1088.

22 In support of the motion to abate, the Arbor LLC defendants
23 argue that as in Wilson's Distributing, this matter should be
24 abated pending resolution of the underlying case because it is
25 clear that the Arbor LLC defendants will be placed in an untenable,
26 conflicted position if forced to respond substantively to
27 plaintiff's claims. Plaintiff acknowledges the controlling law,
28 but notes that a concurrent coverage action is barred only if it

1 would force the insured to abandon its denial of liability in the
2 underlying lawsuit or to produce evidence tending to establish such
3 liability. See American States Ins. Co. v. Dastar Corp., 318 F.3d
4 881, 890-91 (9th Cir. 2003) (noting that the Wilson's
5 Distributing court held that a trial court should stay a
6 determination of the duty to indemnify prior to the resolution of
7 the underlying case when an insurer attempts to place the insured
8 in the conflicted position of being required to abandon its denial
9 of liability in order to obtain coverage).

10 Plaintiff argues that because it seeks legal rulings only, and
11 does not seek any factual determinations, its request for
12 declaratory relief is expressly limited to avoid any possibility
13 that this coverage action will require the Arbor LLC defendants to
14 abandon their denial of underlying liability or come forward with
15 evidence tending to establish such liability. Thus, plaintiff
16 argues, the Wilson's Distributing bar to adjudicating coverage
17 actions does not prevent this action from proceeding.

18 Both plaintiff and the Arbor LLC defendants present arguments
19 regarding the propriety of a stay: plaintiff contends that if the
20 action is abated, it will be unable to properly assess damages and
21 liability for a global mediation conference to be held in December
22 2010. The Arbor LLC defendants note that because the declaratory
23 relief action involves only the duty to indemnify, there is no harm
24 to plaintiff to wait until the underlying lawsuit has concluded
25 before proceeding with this coverage action. And, the Arbor LLC
26 defendants continue, the detriment to them is clear because they
27 will continue to incur fees in this action while possibly
28 jeopardizing their defenses.

1 While the parties make generalized arguments about the pros
2 and cons of a stay, the "conflicted position" issue is a fact-
3 intensive inquiry for each case. Thus, I start by reciting the
4 declarations sought by plaintiff in its Complaint and discussing
5 whether moving forward with litigation over these declarations now
6 would force the Arbor LLC defendants to "prematurely litigate
7 [their] potential liability in [the] underlying [action] and
8 require [them] to take inconsistent positions."

9 The six declarations are as follows:

10 Because all claims against the potential insureds are
11 based on conduct prior to July, 2005, no coverage is
12 available under policy years incepting in or after July,
2005.

13 Because the Policy did not incept until July 23, 2003,
14 and because coverage is limited to damages arising from
15 occurrences during the Policy period, no coverage is
16 available for damages arising from the potential
17 insureds' conduct prior to July 23, 2003.

18 Because the potential insureds only potentially qualify
19 as insureds in their roles as directors, officers and/or
20 real estate managers of Association, no coverage is
21 available for any damages arising out of the potential
22 insureds' conduct in other roles, specifically including,
23 but not limited to, the potential insureds' roles in
24 designing, developing, building, marketing and selling
25 the Townhouses.

26 No coverage is available to the potential insureds under
27 Policy Option DO because: (1) Option DO was not in
28 effect during the time the potential insureds were
directors and/or officers of the Association; (2) all
coverage under that Option is barred pursuant to the
Developer/Sponsor Exclusion Endorsement; and (3) there
has not been a timely "occurrence" pursuant to paragraph
5(b) of Option DO.

Pursuant to the Professional Services Exclusion, no
coverage is available for damages arising from the
potential insureds' rendering or failure to render
professional services, including but not limited to,
accounting, supervisory and/or inspection services. For
example, and without any limitation, the exclusion bars
coverage for all damages arising from the potential
insureds' alleged failure to discover and/or disclose

1 construction defects and associated damages as well as
2 all damages arising from the potential insureds' alleged
mis handling of defendant Association's financial affairs.

3 Pursuant to Exclusion 14, no coverage is available for
4 loss of use damages, arising out of the potential
5 insureds' improper work and/or failure to provide proper
warnings or instructions, to portions of the Townhouses
that have not been physically injured.

6 Compl. at ¶ 19A, 19B, 19C, 19D, 19E, 19F.

7 Initially, a declaration regarding any "conduct" is
8 problematic. The policy does not speak in terms of "conduct," but
9 rather, in terms of property damage and occurrences. Thus,
10 declarations that seek a determination of "conduct" suggest that
11 the Arbor LLC defendants must bring forth facts in this case,
12 forcing them to prematurely develop facts relevant to the
13 underlying case which can put them in a conflicted position.

14 To the extent that the proposed declarations do not encompass
15 the Arbor LLC defendants' conduct, they essentially seek an
16 advisory opinion based on purely hypothetical situations. While
17 there might be a concrete dispute between plaintiff and defendants
18 regarding the scope of the insurance policy's coverage, the
19 proposed declarations as currently structured by plaintiff to limit
20 the potential conflicts for the Arbor LLC defendants, are divorced
21 from the actual facts and thus, are abstract and advisory.

22 It is well recognized that courts do not issue advisory
23 opinions. See, e.g., Laird v. Tatum, 408 U.S. 1, 13-14 (1972)
24 ("the federal courts established pursuant to Article III of the
25 Constitution do not render advisory opinions."); Kittel v. Thomas,
26 620 F.3d 949, 951 (9th Cir. 2010) (federal courts may not issue
27 advisory opinions).

28 Additionally, the law recognizes that questions regarding an

insurer's duty to indemnify are based on the actual facts in the underlying litigation, not the alleged facts. See e.g., Bituminous Cas. Corp. v. Kerr Contractors, Inc., No. CV-10-78-MO, 2010 WL 2572772, at *5 (D. Or. June 22, 2010) (noting that under Oregon law, unlike the duty to defend, liability for indemnity derives from factual determinations separate from the allegations in the complaint); Ledford v. Gutoski, 319 Or. 397, 403, 877 P.2d 80, 84 (1994) ("Even when an insurer does not have a duty to defend based on the allegations in the initial complaint, the facts proved at trial on which liability is established may give rise to a duty to indemnify if the insured's conduct is covered."). Moreover, plaintiff concedes that as this case moves forward, it is likely to seek additional declarations, resulting in a piecemeal and inefficient resolution of the issues if a decision on some declarations is issued now.

On balance, litigating the requested declarations at this point either has the potential to force the Arbor LLC defendants to take conflicting positions, and is likely to result in an advisory opinion. Neither result is acceptable. Combined with the fact that plaintiff will seek additional declarations later as the underlying case develops, the better option is to stay the case pending resolution of the underlying case. Thus, I grant the motion to abate.

III. Motion to Dismiss

In their Answer, the Arbor LLC defendants bring two counterclaims against plaintiff: breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing. Plaintiff moves to dismiss the claims for failure to state a claim.

1 In support of the fiduciary duty claim, the Arbor LLC
2 defendants contend that plaintiff's defense of the Arbor LLC
3 defendants in the underlying litigation has created a special
4 relationship between plaintiff and the Arbor LLC defendants that
5 requires an enhanced duty of care and imposes fiduciary obligations
6 on plaintiff. Arbor LLC Defts' Answer at ¶ 28. The Arbor LLC
7 defendants allege that contrary to plaintiff's enhanced duty of
8 care to defendants, and in violation of its fiduciary obligations
9 to defendants, plaintiff filed this suit, seeking to limit
10 coverage. Id. at ¶ 30.

11 The Arbor LLC defendants contend that they cannot defend
12 against the issues raised by plaintiff in this case without
13 litigating the facts of the underlying dispute. Id. They further
14 contend that the filing of this lawsuit puts the Arbor LLC
15 defendants in the "conflicted position" of trying legal and factual
16 matters that are at issue in the underlying litigation in violation
17 of Wilson's Distributing. Id. at ¶ 31. In so doing, the Arbor LLC
18 defendants allege, plaintiff has placed its own interests above
19 those of its insured. Id. Plaintiff allegedly knows, or should
20 know, that suing its insured is prohibited by Oregon law. Id.
21 Plaintiff's filing of this action allegedly constitutes a breach of
22 its fiduciary obligations to the Arbor LLC defendants. Id.

23 As for the breach of the implied covenant of good faith and
24 fair dealing claim, the Arbor LLC defendants allege that the
25 insurance policy contains an implied contractual covenant of good
26 faith and fair dealing which requires that no party do anything to
27 injure the rights of another to receive the benefits of the
28 agreement. Id. at ¶ 34. They contend that plaintiff breached this

1 covenant by filing suit against defendants during the course of the
2 underlying litigation seeking to limit coverage. Id. at ¶ 35. The
3 Arbor LLC defendants contend that plaintiff's case raises
4 overlapping legal and factual issues and they cannot defend against
5 those issues without litigating substantially all of the facts in
6 the underlying dispute. Id.

7 As with the breach of fiduciary duty claim, the Arbor LLC
8 defendants contend that plaintiff's suit puts the Arbor LLC
9 defendants in the conflicted legal position of trying legal and
10 factual matters at issue in the underlying litigation, in order to
11 prove coverage under the policy, which, the Arbor LLC defendants
12 assert, violates the law in Wilson's Distributing. Because
13 plaintiff has placed its own interests above those of its insured,
14 its filing of the lawsuit allegedly violates the implied covenant
15 of good faith and fair dealing. Id. at ¶ 36.

16 In support of its motion, plaintiff notes that no known case
17 has ever held that the mere act of filing a declaratory judgment
18 action to construe an insurance policy constitutes a breach of
19 fiduciary duty or a breach of the implied covenant of good faith
20 and fair dealing. Plaintiff is correct. Additionally, plaintiff
21 correctly notes that this Court, and the Ninth Circuit, have at
22 least implicitly recognized the insurer's right to bring a coverage
23 action while underlying litigation is still pending. American
24 States, 318 F.3d at 891 (noting that insurer could "litigate the
25 indemnity issue without awaiting the resolution of the underlying
26 action"); Allstate Ins. Co. v. DeLoretto, No. CV-07-310-AA, 2007 WL
27 3408135, at *2-3 (D. Or. Nov. 16, 2007) (granting summary judgment
28 to insurer in coverage action filed while underlying litigation

1 still pending); Allstate Ins. Co. v. Hall, No. CV-06-653-BR, 2006
2 WL 2519608, at *5 (D. Or. Aug. 29, 2006) (denying an insured's
3 motion to dismiss because, among other reasons, the coverage action
4 "will not interfere with or directly impact the underlying state-
5 court action" and "will serve a useful purpose in clarifying the
6 legal relations at issue").

7 The Arbor LLC defendants contend that their counterclaims
8 survive the motion because they have sufficiently pleaded all the
9 facts needed to support the claims and their allegations, taken as
10 true, support each element of each claim. The problem, however, is
11 that without some authority, I am unwilling to conclude that the
12 mere fact of filing the coverage action can constitute a breach of
13 fiduciary duty or a breach of the implied covenant of good faith
14 and fair dealing. That is, plaintiff's filing a complaint seeking
15 clarification of its coverage obligations while the underlying
16 lawsuit is pending is insufficient, as a matter of law, to support
17 the counterclaims. Thus, even accepting the allegations as true,
18 I grant the motion to dismiss.

19 CONCLUSION

20 Defendants' motion to abate [21] is granted. Plaintiff's
21 motion to dismiss the counterclaims [15] is granted.

22 IT IS SO ORDERED.

23 Dated this 18th day of January, 2011.

24
25 /s/ Dennis J. Hubel

26
27 Dennis James Hubel
United States Magistrate Judge